UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

OFFICE OF
GENERAL COUNSEL

April 12, 2019

Liesl Eichler Clark, Director
Michigan Department of Environmental Quality
525 West Allegan Street
P.O. Box 30473
Lansing, MI 48909

Dear Director Clark:

I write to follow up on the letter that U.S. Environmental Protection Agency Region 5 Regional Administrator Cathy Stepp sent to former MDEQ Director, Heidi Grether on April 24, 2018. In that letter, the Regional Administrator responded to Michigan's request seeking EPA's opinion with regard to the potential impacts of Michigan Senate Bills (SB) 652, 653, and 654 on Michigan's implementation of Clean Water Act (CWA) and Clean Air Act (CAA) programs. Since Regional Administrator Stepp transmitted that letter, SB 652 and 653 were modified and then approved by the Michigan legislature, signed by the governor, and became Acts 267 and 268 on June 28, 2018. Region 5 has requested that the Office of General Counsel provide assistance to the State on options for implementing Acts 267 and 268 in a manner that complies with the requirements of CWA § 404 and its implementing regulations. This letter does not address requirements of other federal environmental programs that MDEQ administers, but we would be happy to address the implications for those programs as well.

Based on our review of Acts 267 and 268, it appears the legislation could be implemented in a manner consistent with the requirements of CWA § 404 and EPA regulations. Consistency with federal requirements would require addressing three issues in particular: conflicts of interest, the default issuance of permits, and permit processing deadlines as compared to requirements for federal review of permits under the CWA. The suggested paths forward laid out below involve amendments to the joint Memorandum of Agreement (MOA) that governs the state's administration of the Section 404 program. The amendments could be developed as part of the process for seeking EPA's approval of these state law revisions. As you know, when the state submits a program modification package, the Regional Administrator will act on it pursuant to the procedures laid out in 40 CFR § 233.16(d).

I hope the following suggested approaches are useful as you work through any program revision procedures related to Acts 267 and 268. Michigan was the first state in the nation to assume the

CWA section 404 program and has been effectively administering it for over three decades. EPA is committed to assisting Michigan to continue administering the program consistent with the requirements of the CWA.

1. Conflict of Interest

The federal regulations implementing the state program provisions of CWA section 404 provide that "[a]ny public officer or employee who has a direct personal or pecuniary interest in any matter that is subject to decision by the agency shall make known such interest in the official records of the agency and shall refrain from participating in any matter in such decision." 40 CFR § 233.4. The provision is intended to guard against conflicts of interest among public officers or employees administering a state Section 404 program. Michigan's Act 268 authorizes environmental permit panels that appear to exercise final decision-making authority over permit issuance or denial within MDEQ, and their opinions become the final decisions of MDEQ for purposes of judicial review. MCLA § 324.1317.

The federal conflict of interest restriction appears to apply to members of environmental permit panels convened pursuant to Section 1317 of Act 653. The regulation applies to any "public officer[s] or employee[s]." While panel members are not permitted to be state "employee[s]," *see* MCLA § 324.1313(3)(a), we believe that they are "public officer[s]" under EPA regulations because of their decision-making authority within MDEQ. *See* MCLA § 324.1317. The conflict of interest restriction for environmental review panel members in Act 268, while robust, is not identical to the federal prohibition. Instead, it provides a more specific limitation on employment with a petitioner. MCLA §§ 324.1317(2), (3); 324.1315(2). To address this divergence, MDEQ and the Regional Administrator could amend the joint MOA that governs the state's administration of the Section 404 program to provide that the Director of MDEQ will not select members for the panel authorized by Section 1317 on any matters in which a member may have a "direct personal or pecuniary interest." *See* 40 CFR § 233.4. Amending the MOA to incorporate the language in the federal restriction could address concerns about consistency between federal and state conflict of interest requirements.

2. Default Permit Issuance

The CWA prohibits states from issuing any Section 404 permits unless the permits meet certain criteria, including compliance with the Section 404(b)(1) guidelines. 33 USC § 1344(h)(1). EPA regulations implementing CWA § 404(b)(1) prohibit issuance of a permit for the discharge of dredged or fill material unless the permit meets certain substantive requirements including, among other things, the availability of practicable alternatives, avoiding significant degradation of waters of the United States, compliance with water quality standards, and mitigation. 40 CFR § 230.10. EPA regulations further mandate that the permitting authority make certain factual findings in writing, *id.* at § 230.11, and make written findings of compliance or noncompliance with the Section 404(b)(1) Guidelines. *Id.* at § 230.12. The CWA also requires that any permits issued provide that the state can adequately inspect and monitor discharges, and that, in the view

of the US Army Corps of Engineers, the authorized activities would not substantially impair the navigability of navigable waters. 33 USC § 1344(h)(1).

PA 268 establishes new permit processing requirements for MDEQ, including a requirement that MDEQ must approve or deny permit applications within set processing time frames. MCLA §§ 324.1301(f), 1307(1). As relevant here, permits authorizing projects in inland lakes and streams must be issued within 60 days, or 120 days if a hearing is held, MCLA §§ 324.1301(f)(xv), 1301(g)(vi); and permits authorizing floodplain alteration or dredging, filling, or other activity in wetlands must be issued within 90 days, or 150 days if a hearing is held. MCLA §§ 324.1301(f)(xvi), 1301(g)(viii). If MDEQ fails to meet the approval or denial deadline for permits authorizing dredging or filling in wetlands or bottomlands, the application shall be considered approved and the department shall be considered to have made any determination needed for approval. MCLA § 324.1307(8).

The provision in Section 1307(8) of Act 268 providing that certain permits shall be approved if the deadline for issuance or denial is not met raises a concern about consistency with the federal prohibitions on state issuance of Section 404 permits if those permits lack certain provisions. To address this concern, MDEQ and the Regional Administrator could amend the MOA that governs the state's administration of the Section 404 program to provide that, for those Section 404 permits subject to default issuance, MDEQ will either issue the permits by the processing deadlines or else deny those permits. *See* MCLA § 324.1307(8); 33 USC § 1344(h); 40 CFR § 233.50. The MOA could specify that MDEQ would devote sufficient resources to permit reviews to ensure that staff are able to meet the processing deadlines. Adding these commitments to the MOA could help ensure that MDEQ issues permits that comply with the above-mentioned requirements of the CWA and implementing regulations.

3. Consistency between Permit Processing Deadlines and Timelines for Federal Agency and Public Review and Comment on Permits Pursuant to the CWA

The CWA provides for EPA oversight of state Section 404 permit issuance and allows EPA a certain period of time to provide comments and for the state to address the comments. 33 USC § 1344(j). Specifically, the Act provides that if EPA intends to comment upon, object to, or make recommendations with respect to a permit application, EPA shall notify the state within 30 days of receiving the draft. *Id.* The statute then prohibits the state from issuing the permit until after the receipt of such comments or 90 days after EPA's receipt of the public notice of the permit, whichever comes first. *Id.* If EPA objects or requires a new permit condition, the state may not issue the permit unless it has taken the required steps to eliminate the objection. *Id.*

After receipt of an EPA objection or requirement for a permit condition, the state must allow 90 days for the state or interested parties to request a public hearing and must convene one on request. 33 USC § 1344(j); 40 CFR § 233.50(g). After the hearing or in its absence, if EPA does not withdraw the objection or requirement for a permit condition, the state must issue a permit revised to satisfy EPA's objection or requirement for a permit condition or notify EPA of its intent to deny the permit. *Id.* at § 1344(j); 40 CFR § 233.50(h).

As explained above, Act 268 establishes a requirement that MDEQ must approve or deny permit applications within set processing time frames, including 60 days for permits authorizing projects in inland lakes and streams, or 120 days if a hearing is held, and 90 days for permits authorizing floodplain alteration or dredging, filling, or other activity in wetlands, or 150 days if a hearing is held. The deadlines that MDEQ has established for the issuance of Section 404 permits may not allow for the statutorily-mandated time periods for EPA's oversight and public comment on state-issued permits.

As one option to ensure that MDEQ does not issue permits without truncating the requirements for federal and public review and comment under the CWA, the State could provide an interpretation that the criteria required for a permit denial are satisfied by an objection or required permit condition from EPA. *See* MCLA § 324.1307(6). The MOA could be amended to provide that, if EPA notified the state that it intended to provide input on the permit, the state would convene public hearings in order to extend the permit processing deadlines in Act 268. If EPA then objected to the permit or required a permit condition, MDEQ would deny the permit. A permit applicant could toll the processing deadlines by petitioning for review by an environmental permit panel, pursuant to Section 1315 of Act 268, allowing more time to resolve EPA's concerns, but if the concerns were not addressed during the petition process the permit would be denied.

The state's legal interpretation that an EPA objection satisfies the criteria required for a permit denial and a commitment to deny permits if EPA objects could help ensure that MDEQ does not issue a permit by the processing deadlines in Act without allowing for the statutorily mandated review period. *See* 33 USC § 1344(j); 40 CFR § 233.50. EPA would be happy to assist in suggesting MOA language to effectuate this approach.

I hope these suggested approaches ensure a continued successful partnership between EPA and Michigan in administering CWA section 404. EPA stands ready to review any submissions related to program modifications. In the meantime, please contact me or my staff, at (202) 564-8040, if you would like to discuss these issues further.

Sincerely,

Matthew Z. Leopold
General Counsel